RHB Investment Bank Bhd & Ors v Plaza Rakyat Sdn Bhd & Anor (No 2)

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC-516 OF 2010
MOHAMAD ARIFF J
12 APRIL 2012

Limitation — Action for money lent — Loan secured by charge over land — Whether 12-year limitation period applied whenever loan was secured by charge — Whether letters acknowledging debt and forming part of contingent contract which became void were valid to prove indebtedness — Whether acknowledgment letters unequivocal and independent of validity of contract

The plaintiffs brought the instant action to recover amounts due under a syndicated term loan granted to the first defendant ('PRSB') to finance the construction of a mixed integrated development project known as Plaza Rakyat. The second defendant was PRSB's holding company and guarantor for the loan while the first plaintiff acted both as agent bank and security agent for the other plaintiffs. The project was to be built on five pieces of land leased to PRSB by Dewan Bandaraya Kuala Lumpur ('DBKL') under a joint-venture agreement ('JVA') between the two parties. The loan was, inter alia, secured by first fixed charges over four of the five pieces of leased land. Following PRSB's default, the plaintiffs issued it a letter of demand on 3 April 1998 ('the first demand') for repayment of all monies owing under the loan. The demand was not complied with and the defendants were given time to repay. On 24 March 2004, and at the plaintiffs' request, the defendants issued separate letters ('the acknowledgment letters') to the plaintiffs expressly acknowledging their defaults and indebtedness under the loan. The letters were issued in connection with a debt restructuring agreement ('DRA') proposed by the defendants to which all their creditors, including the plaintiffs, had agreed to. The DRA, however, became void due to PRSB's failure to comply with a condition precedent to the agreement. The plaintiffs filed the instant suit on 18 March 2010. In the meanwhile, following its issuance of notices of default to PRSB under the JVA, DBKL, as was required by the JVA, wrote to the plaintiffs to nominate an entity to substitute PRSB before it terminated the lease on the project lands. Concerned that the termination of the leases would prejudice their charges over the lands, the plaintiffs agreed to allow DBKL to nominate a substituted entity of its choice to replace PRSB but no such entity was in fact appointed. The defendants' two main defences were that the instant action was statute-barred and that by agreeing to the appointment of a substituted entity to replace PRSB under the JVA, the plaintiffs had waived their rights under the loan and security agreements. The defendants argued that the applicable

limitation period was six years under s 6(1)(a) of the Limitation Act 1953 ('the Act') as the claim was simply for monies due under the loan agreement and that if time was computed from the making of the first demand, the suit was statute-barred. They also said the acknowledgment letters were conditional upon the validity of the DRA and since the latter become void, any acknowledgment of indebtedness contained in the DRA also became void. The plaintiffs, on the other hand, argued that the applicable limitation period was 12 years under s 21(1) of the Act as claim was for monies that were secured by a charge. As such, even if time was computed from the first demand, the claim was not time-barred. Alternatively, if the limitation period was taken to be six years, the acknowledgment letters, which were in themselves valid and independent of the void DRA, saved the action from being time-barred. The plaintiffs denied they had waived their rights or relieved the defendants of their liability simply because they had agreed to allow DBKL to appoint a substitute entity in the JVA in place of PRSB.

Held, allowing the claim with costs on a solicitor-client basis to be taxed:

(1) Section 21(1) of the Act provided for a limitation period of 12 years for a claim of money which was secured by a charge. It was not the source of the claim that was critical but the more general consideration of whether the money claimed was secured by a charge. The logic was not difficult to see. It was to avoid an incongruous situation where two different limitation periods were applicable to the same facility where the facility was secured by a charge (see para 66).

(2) Even if the court was wrong in its reading of s 21(1) read with s 6(5) of the Act, the facts clearly showed there was an express acknowledgment of the debt under ss 26(2) and 27(1) of the Act. Since the requirements for the acknowledgment to be unequivocal and in writing had been satisfied, the operative date for calculating limitation would be 23 March 2004 and the instant action being filed on 18 March 2010 would, on the alternative view, be within the limitation period (see paras 69 & 71).

(3) The rule of non-enforceability of a contract did not affect its availability as an acknowledgment as it was merely evidence of a defendant's pre-existing liability and not the foundation of the plaintiff's claim. The acknowledgment letters were unequivocal and not conditional upon the DRA being executed (see para 74).

(4) The evidence fell far short of showing the plaintiffs had waived their rights under the loan agreement by agreeing to the nomination of a substituted entity in place of PRSB. In any event, no substituted entity was appointed by DBKL. Furthermore, in the arbitration proceedings between PRSB and DBKL, the former had factored in the claim by the

plaintiffs against it as part of its own claim against DBKL. This pointed to another weakness in the defendants' case and the absence of real merits in the defence (see para 79).

[Bahasa Malaysia summary

Plaintif-plaintif memulakan tindakan ini untuk mendapatkan semula jumlah tertunggak di bawah pinjaman berjangka sindiket yang diberikan kepada defendan pertama ('PRSB') untuk membiaya pembinaan satu projek pembangunan integrasi bercampur dikenali sebagai Plaza Rakyat. Defendan kedua adalah syarikat induk PRSB dan penjamin pinjaman tersebut sementara plaintif pertama bertindak sebagai ejen bank dan ejen jaminan bagi plaintif-plaintif lain. Projek tersebut sepatutnya dibina di atas lima bidang tanah yang dipajak kepada PRSB oleh Dewan Bandaraya Kuala Lumpur ('DBKL') di bawah perjanjian usaha sama ('PUS') di antara kedua-dua pihak. Pinjaman tersebut, antara lain, dijamin oleh caj tetap pertama ke atas empat daripada lima bidang tanah yang dipajak. Berikutan kegagalan PRSB membayar, plaintif-plaintif mengeluarkan surat tuntutan pada 3 April 1998 ('tuntutan pertama') bagi pembayaran semula kesemua wang yang terhutang di bawah pinjaman tersebut. Tuntutan tersebut tidak dipatuhi dan defendan-defendan diberikan masa untuk membayar semula. Pada 24 Mac 2004, dan atas permintaan plaintif-plaintif, defendan-defendan mengeluarkan surat-surat secara berasingan ('surat-surat pengakuan') kepada plaintif-plaintif mengakui secara langsung kegagalan dan keberhutangan di bawah pinjaman. Surat-surat tersebut dikeluarkan berkaitan dengan perjanjian penstrukturan semula hutang ('PPH') yang dicadangkan oleh defendan-defendan yang dipersetujui oleh kesemua pemiutang-pemiutang mereka, termasuk plaintif-plaintif. PPH tersebut, walau bagaimanapun, menjadi batal kerana kegagalan PRSB untuk mematuhi syarat duluan perjanjian tersebut. Plaintif-plaintif memfailkan guaman ini pada 18 Mac 2010. Sementara itu, berikutan pengeluaran notis kegagalan kepada PRSB di bawah PUS, DBKL, seperti yang dikehendaki oleh PUS, menulis kepada plaintif-plaintif untuk mencadangkan suatu entiti untuk menggantikan PRSB sebelum ia menamatkan pajakan atas tanah projek tersebut. Bimbang bahawa penamatan pajakan akan memprejudis caj mereka ke atas tanah-tanah tersebut, plaintif-plaintif bersetuju untuk membenarkan DBKL mencadangkan entiti ganti yang dipilihnya untuk menggantikan PRSB tetapi tidak ada entiti sedemikian yang dilantik. Dua pembelaan defendan-defendan adalah bahawa tindakan ini adalah dihalang oleh statut dan bahawa dengan bersetuju dengan pelantikan entiti ganti untuk menggantikan PRSB di bawah PUS, plaintif-plaintif telah mengetepikan hak mereka di bawah pinjaman dan perjanjian-perjanjian jaminan. Defendan-defendan menghujah bahawa tempoh had masa yang beraplikasi adalah enam tahun di bawah s 6(1)(a) Akta Had Masa 1953 ('Akta') kerana tuntutan tersebut adalah semata-mata untuk wang yang tertunggak di bawah perjanjian pinjaman dan jika masa dikira daripada tuntutan pertama, guaman tersebut adalah dihalang oleh masa.

Mereka juga menyatakan bahawa surat-surat pengakuan adalah bersyarat dengan keesahan PPH dan oleh sebab PPH telah menjadi batal, apa-apa pengakuan keberhutangan yang terkandung di dalam PPH juga adalah batal. Plaintif-plaintif, sebaliknya, menghujah bahawa tempoh masa yang beraplikasi adalah 12 tahun di bawah s 21(1) Akta kerana tuntutan tersebut adalah untuk wang yang dijamin oleh caj. Oleh demikian, jika pun masa dikira daripada tuntutan pertama, tuntutan tersebut tidak dihalang oleh masa. Secara alternatif, jika tempoh had masa adalah dikira sebagai enam tahun, surat-surat pengakuan, yang sendirinya sah dan bebas daripada PPH yang batal, menyelamatkan tindakan daripada dihalang oleh masa. Plaintif-plaintif menafikan mereka telah mengenepikan hak-hak mereka atau melepaskan defendan-defendan daripada liabiliti semata-mata kerana mereka bersetuju untuk mengikuti DBKL untuk melantik entiti ganti dalam PUS menggantikan PRSB.

Diputuskan, membenarkan tuntutan dengan kos atas dasar peguamcara-anak guam untuk ditetapkan:

(1) Seksyen 21(1) Akta memperuntukkan tempoh had masa 12 tahun bagi tuntutan wang yang dijamin oleh caj. Bukan sumber tuntutan yang kritikal tetapi pertimbangan yang lebih umum sama ada wang yang dituntut dijamin oleh caj. Kelogikan tersebut tidak sukar untuk dilihat. Ia adalah untuk mengelakkan situasi tidak harmoni di mana tempoh had masa yang berbeza beraplikasi kepada kemudahan yang sama di mana kemudahan tersebut dijamin oleh caj (lihat perenggan 66).

(2) Walaupun mahkamah khilaf dalam pembacaan s 21(1) dibaca bersama dengan s 6(5) Akta, fakta-fakta jelas menunjukkan bahawa terdapat pengakuan secara langsung bagi hutang di bawah ss 26(2) dan 27(1) Akta. Oleh sebab keperluan untuk pengakuan yang patut jelas dan dalam bentuk tulisan telah dipenuhi, tarikh kuatkuasa untuk pengiraan had masa adalah 23 Mac 2004 dan tindakan ini yang difailkan pada 18 Mac 2010 akan, atas pandangan alternatif, terangkum dalam tempoh had masa (lihat perenggan 69 & 71).

(3) Peraturan ketidak penguatkuasaan kontrak tidak menjejaskan kebolehsediaan sebagai pengakuan kerana ia adalah semata-mata keterangan mengenai liabiliti sedia ada defendan dan bukan asas tuntutan plaintif. Surat-surat pengakuan tersebut adalah jelas dan tidak bersyarat atas penandatanganan PPH (lihat perenggan 74).

(4) Tidak ada keterangan yang menunjukkan bahawa plaintif-plaintif telah mengenepikan hak mereka di bawah perjanjian pinjaman dengan menyetujui cadangan entiti ganti untuk menggantikan PRSB. Walau bagaimanapun, tidak ada entiti ganti yang dilantik oleh DBKL. Selanjutnya, dalam prosiding timbang tara antara PRSB dan DBKL, PRSB telah memasukkan tuntutan oleh plaintif-plaintif terhadapnya

A sebagai sebahagian daripada tuntutannya terhadap DBKL. Ini menunjukkan satu lagi kelemahan kes defendan-defendan dan ketiadaan merit yang sebenar di dalam pembelaan (lihat perenggan 79).]

Notes

B For a case on loan secured by a charge over land, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) para 2118.

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47, PC (refd)
C *Barnes v Glenton* [1899] 1 QB 885, CA (refd)
Chan Boi Loi v Public Bank and another application [2011] 1 MLJ 478, FC (refd)
Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd [1988] 2 MLJ 62 (refd)
D *CIMB Bank v Tan Hua Peng @ Tan Kwah Peng* [2012] 8 MLJ 442 (refd)
Jaafar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24, SC (refd)
Kong Ming Bank Bhd v Sim Siok Eng [1982] 2 MLJ 205, PC (refd)
Mahadevan & Anor v Manilal & Son (M) Sdn Bhd [1984] 1 MLJ 266, FC (refd)
E *Malayan Banking Bhd v Wembley Industries Holdings Bhd* [2012] MLJU 91, HC (folld)
Mintye Properties Sdn Bhd v Yayasan Melaka [2006] 6 MLJ 420, CA (refd)
National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (refd)
F *Pengurusan Danaharta Nasional Bhd & Ors v Tan Sri Dato' Tajuddin Ramli (No 4)* [2010] 6 CLJ 84, HC (refd)
Public Bank Bhd v Tan Sri Datuk Yacob Hitam & Paramjit Singh Gill [2011] 6 AMR 364, HC (refd)
RHB Investment Bank Bhd & Ors v Plaza Rakyat Sdn Bhd & Anor [2012] 7 MLJ 271, HC (refd)
G *Tan Kong Ming v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601, FC (refd)
Terengganu State Economic Development Corporation v Nadefinco [1982] 1 MLJ 365, FC (refd)
H *Verschures Creamaries Ltd v Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608, CA (refd)
Wilkinson v West Bromwich Building Society [2004] EWCA Civ 1063, CA (refd)

I **Legislation referred to**

Contracts Act 1950 ss 32, 33, 36, 40
Limitation Act 1953 ss 6(1)(a), (5), 21, 21(1), (5), 26(2), 27(1)
Limitation Act 1980 [UK] ss 5, 20(1)(a), (b)
Real Property Act 1974 [UK]

Yoong Sin Min (Ng Hooi Huang & Cheah Faan Jin with her) (Shook Lin & Bok) for the plaintiffs.
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Mohamad Ariff J:

INTRODUCTION AND BACKGROUND FACTS

The syndicated term loan facility

[1] The plaintiffs' claim in this suit is for sums due to syndicate lenders under a syndicated term loan facility of RM200m granted under a syndicated five-year term loan agreement dated 27 June 1994. The first plaintiff acts as the agent bank and security agent for the second to sixth plaintiffs. It has to be noted at the outset that some of the names of the original lenders have undergone changes arising from change of name, bank mergers and several vesting orders from the court. The facility was granted to the first defendant, Plaza Rakyat Sdn Bhd, ('PRSB') for the financing of the construction of a mixed, integrated development project known as Plaza Rakyat. The project was to comprise the construction of a retail plaza, exhibition and convention areas, entertainment areas, cineplex, hotel, office tower and apartments on five pieces of land leased to PRSB by Dewan Bandar Raya Kuala Lumpur ('DBKL' and 'the project lands' respectively). This grand project was the product of a joint-venture agreement dated 16 December 1992 between PRSB and DBKL.

[2] The Plaza Rakyat project remains uncompleted as at the date of this trial. DBKL has since also terminated the joint-venture agreement. There is currently an ongoing dispute between the first defendant and DBKL which is presently the subject matter of arbitration.

The security instruments, charges over project lands

[3] The facility was secured, inter alia, by first fixed charges over four out of the five pieces of the project lands leased to Plaza Rakyat by DBKL, a debenture, an assignment of rights by the first defendant over certain agreements, an assignment of all rights, title and interest to monies payable under an advance payment guarantee, an insurance assignment, a proceeds assignment and a memorandum of deposit over shares executed by a company called Clifford Investments Ltd and the second defendant. The relevant security for purposes of this trial is the charges over the project lands. The first fixed charge over the lands is evidenced by the relevant Form 16A and the charge annexure thereto, which has been exhibited at pp 347–368 of exh P1.

The second defendant as corporate guarantor

[4] The second defendant ('Wembley') is the holding company of PRSB and the corporate guarantor for it for the facility. It was at the material times a listed company on Bursa Malaysia. It appears it has now been de-listed.

Drawdown and default

[5] The facility, although it was for RM200m for a five-year term, was only partly drawdown in the sum of RM50m. It appears from the evidence that there was no further request for drawdown initially because the lenders were informed by PRSB that it was negotiating with its contractor (Daewoo Corp) on a revised construction contract, and apparently it had also changed its insurers. The evidence also discloses numerous letters and requests for information by the agent on the revised project and plans, including the revised schedule for completion, the revised total cost of the project, the cashflow projections and management accounts, progress reports and so forth. According to the plaintiffs, PRSB failed to furnish the required information and the documents requested. On 31 March 1997, however, PRSB requested for an extension of the availability period of the syndicated term loan which expired on 31 March 1997. The lenders did not agree to extend the availability period for further drawdown and hence the loan expired on 31 March 1997.

[6] It is common ground that PRSB as borrower of the facility defaulted on the loan drawdown and a letter of demand was issued to it on 3 April 1998 for repayment of RM1,921,575.34, being the interest payable calculated as at 2 March 1998 and the drawndown loan sum of RM50m. The sum demanded also included unpaid agency fee and late payment interest. See exh D5. It is common ground that PRSB did not pay the amount demanded.

Attempted restructuring schemes

[7] At about this period, PRSB was facing demands from its creditors. On 24 April 1998, it obtained a restraining order from court in order to effect a proposed scheme of arrangement with its creditors, including the plaintiffs. This was a scheme which also involved a related company of PRSB, namely Ekran Bhd. The proposed scheme did not materialise.

[8] Another restructuring scheme was proposed sometime in January 2000, this time together with Wembley. See pp 558–559 of exh 'P2' for the relevant correspondence between PRSB and the first plaintiff in this regard. The proposal was to restructure the debts of PRSB and Wembley which would be paid by the issue by Wembley of irredeemable convertible unsecured loan stocks ('ICULS') and warrants.

[9] The defendants then requested for indulgence to repay its indebtedness, and had, at the request of the plaintiffs, issued separate letters both dated 24 March 2004 to the first plaintiff as security agent. The letter from Plaza Rakyat states very expressly that it had defaulted under the term loan facility and the loan agreement, and further, at its request and the request of Wembley, the lenders had agreed to accept a debt restructuring scheme proposed by it and Wembley.

[10] This letter has to be quoted in some detail, given its importance. The critical parts read:

> 2. We have defaulted under the Term Loan Facility and the Loan Agreement.
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> 3. At the request of the Wembley Industries Holdings Berhad ('WIHB') and ourselves, the Lenders have agreed to accept a Debt Restructuring Scheme proposed by us and WIHB in respect of the indebtedness due and owing to the Lenders under the Term Loan Facility and other indebtedness due and owing by us, WIHB and/or its subsidiaries to other Financiers and Creditors upon and subject to the terms and conditions contained in a Debt Restructuring Agreement entered or to be entered into between us, WIHB, the Lenders and other Financiers and Creditors as aforesaid. To date, the said Debt Restructuring Agreement has yet to be executed by all parties thereto.
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> 4. We hereby acknowledge, admit and confirm that the amount of indebtedness owing by us to the Lenders under the Term Loan Facility, the Loan Agreement and the Security Agreement is RM76,026,021 as at 31 December 2001 Interest shall continue to accrue and being payable thereon to the date of full settlement unless waived in accordance with the terms of the said Debt Restructuring Agreement if and when it is executed by all parties thereto.

[11] The letter from Wembley, as corporate guarantor, also expressly acknowledged PRSB had defaulted, and as corporate guarantor, Wembley acknowledged, admitted and confirmed the same amount of indebtedness. See pp 601–02 of exh P2 for copies of the letters.

Debt restructuring agreement

[12] It is also common ground that the parties subsequently entered into a debt restructuring agreement ('DRA') dated 15 October 2004. The DRA is exhibited from pp 491–528 of exh P2.

[13] The DRA was entered into between the defendants and their creditors and financiers, including the present plaintiffs.

[14] The DRA, although entered into, was subsequently deemed terminated and lapsed since a condition precedent was not complied by the first defendant, that is to secure the approval of the Securities Commission for the issuance of irredeemable convertible unsecured loan stocks ('ICULS') which was to be essentially the instrument for repayment of the loan. This was one of the conditions precedent stipulated in the DRA which had to be fulfilled by the cut-off date of 31 December 2004.

[15] Because the first defendant was unable to resolve its outstanding problems with DBKL, SC did not give its unconditional approval for the issuance. The elaborate conditions precedent can be found in cl 2.1 of the DRA, which reads in its material parts:

> 2 Conditions Precedent
>
> 2.1 The Debt Restructuring Scheme shall only be implemented upon the satisfaction of all the following conditions precedent on before the 31st day of December 2004 or such extensions of time as may be approved by the Majority Secured Financiers, the Majority Unsecured Financiers and the Majority Creditors ('Cut-Off Date'):
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> …
>
> (c) The Company shall have obtained and/procured the following approval:
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> (i) The approval of the Securities Commission for the implementation of the Proposals, the issuance of the ICULS, the Warrants and the new Shares to be issued upon conversion of the ICULS; …

[16] It is also necessary to highlight at the outset cll 2.5–2.6:

> In the event that:
>
> a any one or more of the conditions set out in Clause 2.1 above is not satisfied (unless waived in writing each of the Majorities) on or before the Cut-Off Date; or
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> b the ICULS are not issued pursuant to the Trust Deed on the Completion Date; or
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> …
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> then all the Financiers and Creditors shall be immediately discharged from all of their obligations to the Company and the Subsidiaries under this Agreement.
>
> c the Warrants are not issued pursuant to the Deed Poll on the Completion Date; or
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> 2.6 At any time after this Agreement is terminated pursuant to Clause 2.5 above, each of the Financiers and Creditors shall be entitled:
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> (a) to make demand on the respective Group Member, Former

Subsidiary and/or Security Party for the immediate payment or repayment of all outstanding indebtedness due to it under arising from the Facilities and the Existing Financing Documents or as the case may be, the Amount Owing and the Non-Financing Documents together with interest thereon (where applicable) and all other sums payable in connection therewith as if this Agreement had never been entered into; and/or

(b) without being required to give notice to any of the Group Member, Former Subsidiary or Security Party, to institute proceedings and/or re-commence any proceedings, proceed with execution of any judgment obtained by it, take such steps (including any proceedings, for the realisation of its security (if any)) and exercise any other rights which it may have against the respective Group Member, Former Subsidiary and/or Security Party as it may think fit by statute or otherwise to recover all amounts due and payable to it as aforesaid and/or pursuant to such judgment.

[17] Thus, as apparent from its wording, if any of the conditions precedent (to include the issue of the ICULS and warrants) is not satisfied by the cut-off date (31 December 2004), then all the financiers and creditors shall be immediately discharged from all of the obligations to the company and subsidiaries under the DRA, whereupon, and pursuant to this termination, each of the financiers and creditors shall be entitled to make demand for the immediate payment or repayment of all outstanding indebtedness to it together with interest.

Saving provision

[18] Clause 10 of the DRA further provides for 'Admission of Indebtedness and Saving of Financiers' and Creditors' Rights'. It states:

10.1 The Company ['Wembley'] and PRSB hereby acknowledge and admit that the amount of indebtedness owing by each of them to the Financiers and Creditors under or in respect of the Facilities and the Non-Financing documents respectively as at the 31st day of December 2001 are as set out in the fifth (5th) column of Schedule 3 hereto.

10.2 Save as expressly provided herein, nothing herein contained shall release or discharge:

(a) any Group Member of Former Subsidiary from all or any of its liabilities and obligations to the Financiers or any of them in relation to its indebtedness or any part thereof under, arising from or in connection with the Facilities or any of the Existing Financing Documents or any judgment obtained against it by any of the Financiers; or

(b) any Security Party from any or all of its liabilities and obligations to

A the Financiers or any of them under, arising from or in connection with any guarantee or security given by it to the Financiers or any judgment obtained against it but any of the Financiers;

nor shall anything herein contained prejudice or affect any or all the rights and remedies to which the Financiers shall be entitled against any Group Member, Former Subsidiary and/or any Security Party in respect of any or all sums due and payable by any Group Member, Former Subsidiary and/or any Security Party to the Financiers or any of them or to which the Financiers shall be entitled in relation to the existing financing documents or such guarantee, security or judgment.

10.3 The Company and PRSB hereby agrees and confirms that save as otherwise provided herein, the Existing Financing Documents shall remain in full force and effect, binding on the respective parties thereto by way of continuing security in accordance with the terms thereof.

10.4 Subject as expressly provided herein, nothing herein contained shall release or discharge any Group Member from its liabilities and obligations (if any) to the Creditors in relation to its indebtedness or any part thereof under, arising from or in connection with the Amount Owing or any of the Non-Financing Documents nor shall anything herein contained prejudice or affect the rights and remedies (if any) to which the Creditors shall be legally entitled against any Group Member in respect of any or all sums due and payable by any Group Member to the Creditors or any of them or to which the Creditors shall be legally entitled in relation to the Non-Financing Documents.

[19] This provision contains very wide terms regulating the respective positions of the parties to this dispute under the DRA. On the one hand, PRSB and Wembley acknowledge and admit the indebtedness owing to the plaintiffs (and to the other creditors and financiers) as fully set out in the fifth column of Schedule 3. It also provides that except as provided in the DRA, the existing financing documents shall remain in full force and effect and binding by way of continuing security.

Events subsequent to the lapse of the DRA

[20] That the DRA had lapsed upon expiry of the cut-off date was confirmed by Wembley in its Bursa Malaysia general announcement made on 30 June 2005. See pp 1042–1045 of exh P3. The general announcement said 'unless the company secures an extension of the cut-off date to fulfill the conditions precedent of the DRA, the DRA would have lapsed and cease to have any effect from 1st January 2005 onwards, the Lenders may therefore take legal action to recover the outstanding amount owing to them at any time'.

[21] The plaintiff did not commence legal action immediately after the DRA had lapsed because PRSB and Wembley had informed the plaintiffs that they

were negotiating with DBKL to revive the project and requested for further indulgence. The evidence disclosed a series of correspondence on this issue between the first plaintiff and PRSB from 2006–2008. These can be found at pp 605–612 of exh P2. Since the plaintiffs did not receive any concrete proposal from PRSB and Wembley for the settlement of the debt, the plaintiff requested for an acknowledgement of the debt to be signed by PRSB and Wembley by a letter dated 10 December 2009. This letter can be seen at p 703 of exh P3.

[22] According to the plaintiffs' evidence (and this can be seen in the testimony of PW1 at p 10 of the notes of evidence), since the plaintiffs had not received any concrete proposal from PRSB and Wembley, and the plaintiffs were concerned that the six-year limitation period to recover the loan may set in, this fresh acknowledgement of debt from Wembley and PRSB was requested. PW1 (Wong Yee Ching) is the assistant vice president of the first plaintiff.

[23] On 5 February 2010 a reminder was sent by the first plaintiff to PRSB requesting that the fresh acknowledgment be executed by PRSB and Wembley. No response from either PRSB or Wembley was received by the first plaintiff.

[24] According to PW1, the plaintiffs were thus compelled to commence legal action before the expiry of the limitation period. See the explanation given by PW1 in examination-in-chief at pp 15–18 of the notes of evidence:

> Q. Did the Plaintiffs commence legal action to recover the debt thereafter?
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> A. The Plaintiffs did not commence legal action immediately after the lapsing of the DRA because PRSB and Wembley were informed, because PRSB and Wembley informed, the Plaintiffs that they were negotiating with DBKL to revive the Project and requested for further indulgence. However, the terms of the negotiations were not known to the Plaintiffs although the Plaintiffs had requested for a revised proposal from PRSB, as the DRA had lapsed, please see letters dated 30.3.2006 and 4.9.2006 from RHB Investment Bank to PRSB at page 605, of P-2.
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> …
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> Please see also Tetters dated 6.7.2007, 9.7.2007, 16.7.2007, 30.7.2007, 22.5.2008 and 13.6.2008 between RHB Investment Bank and PRSB at pages 606–612, P2.
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> Q. What transpired thereafter?
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> A. The Plaintiffs received no concrete proposal from PRSB and Wembley for settlement of their debt. On 10.12.2009, the Plaintiffs requested for an acknowledgment of debt to be signed by PRSB and Wembley. This arose as the Plaintiffs were concerned that the 6 year limitation period to recover the loan may set in, since the acknowledgments of debt by PRSB and

Wembley under the DRA and their letters of 24.3.2004 were made almost 6 years earlier. Please see RHB Investment Bank's letter dated 10.12.2009 to PRSB at page 703, of P3 …

On 5.2.2010, RHB Investment Bank sent a reminder to PRSB requesting for the acknowledgment of debt to be executed by PRSB and Wembley. Please see RHB Investment Bank's letter dated 5.2.2010 to PRSB at pages 704–708, of P3.

…

RHB Investment Bank received no response from PRSB and Wembley. The Plaintiffs thus were compelled to commence legal action before the expiry of the limitation period. The Plaintiffs through their solicitors, Messrs Shook Lin & Bok, issued letters of demand dated 25.2.2010 to PRSB and Wembley demanding payment of all sums due and owing to the Lenders. Please see letters of demand dated 25.2.2010 together with acknowledgment of receipt and proof of posting at pages 709–717, P3.

…

Q. When was this suit filed?

A. On 18.3.2010, the Plaintiffs commenced the present action against PRSB and Wembley for recovery of the amount due as at 31.1.2010 with interest thereon under the Facility, set out as follows:

Due to the 2nd Plaintiff

(a) RM50,820,161.42 with interest thereon at 2.0% per annum above the 2nd Plaintiffs Cost of Funds and a further default interest of 1% per annum thereon on all overdue payments, compounded monthly, from 1.2.2010 to date of full payment; and

(b) RM25,204.632.80 with interest thereon at 2% per annum above the 1st Plaintiffs Cost of Funds and a further default interest of 1% per annum thereon on all overdue payments, compounded monthly, from 1.2.2010 to date of full payment.

Due to 3rd Plaintiff

RM9.513,244.38 with interest thereon at 2.0% per annum above the 3rd Plaintiffs Cost of Funds and a further default interest of 1% per annum thereon on all overdue payments, compounded monthly, from 1.2.2010 to date of full payment.

Due to 4th Plaintiff

RM18,671,606.04 with interest thereon at 2.0% per annum above the 4th Plaintiffs Cost of Funds and a further default interest of 1% per annum on all overdue payments, compounded monthly, from

1.2.2010 to date of full payment.

Due to 5th Plaintiff

RM17,114,603.61 with interest thereon at 1.5% per annum above the 5th Plaintiffs Base Lending Rate and a further default interest of 1% per annum on all overdue payments, compounded monthly, from 1.2.2010 to date of full payment.

Due to 6th Plaintiff

RM23,526,186.01 with interest thereon at 1.5% per annum above the 6th Plaintiffs Base Lending Rate and a further default interest of 1% per annum on all overdue payments, compounded monthly, from 1.2.2010 to date of full payment.

Due to 1st Plaintiff

All costs and expenses (including legal expenses) incurred by the 1st Plaintiff, as Agent for the said Facility in actions taken for recovery of the monies due from the Defendants herein.

Q. Please refer to pages 968–1007, of P-2, what documents are these?

A. These are the Statements of Accounts and Certificate of Indebtedness setting out and verifying the amounts due as at 31.1.2010 to each Lender. I state that these are the Statements of Accounts for the outstanding Loan and I have produced the same for these proceedings by a computer in the course of its ordinary use. I am responsible for the management and operation of the computer which generated the Statements of Accounts. The computer generating the Statements of Accounts was in good working order and was operating properly in all respects throughout the material part of the period during which the Statements of Accounts were produced. The amounts outstanding and due to each Lender were verified by the respective Lenders.

[25] By the evidence on record, the present suit was filed on 18 March 2010 after a letter of demand dated 25 February 2010 had been sent to PRSB. See pp 709–712 of exh P3.

[26] There was an earlier application for summary judgment by the plaintiffs before another court, which was dismissed by the learned judge since there were held to be triable issues raised. This decision is reported as *RHB Investment Bank Bhd & Ors v Plaza Rakyat Sdn Bhd & Anor* [2012] 7 MLJ 271 (decision of Mah Weng Kwai J).

[27] This present case has been heard thereafter as a full trial.

Dealings between DBKL and the plaintiffs after the lapse of the DRA

[28] On 9 February 2010 DBKL sent a letter to the plaintiffs requesting the

Plaintiffs to nominate a substituted entity since DBKL had issued notices of default to PRSB. See p 63 of exh P4 for a copy of the DBKL letter. As for the notices of default, see pp 1061–1066 of P3.

[29] DBKL had written to the plaintiffs because under the JVA between DBKL and PRSB, before DBKL could terminate the lease of the project lands DBKL had to serve a notice on the plaintiffs to notify the plaintiffs of PRSB's default and requiring the plaintiff to nominate an entity to substitute PRSB as may be approved by the Datuk Bandar.

[30] It is also part of the record that there was a meeting between the plaintiffs (except for the third plaintiff) and DBKL on 4 March 2010. At that meeting too the plaintiff informed DBKL they were unable to nominate a substituted entity for PRSB.

[31] PW1 had this to say on the matter (examination-in-chief, at pp 21–23 of the notes of evidence):

> Q. It was alleged by PRSB and Wembley that the Plaintiffs had met with and negotiated with DBKL to appoint a substituted entity to take over the debt of PRSB and Wembley. Is this true?
>
> A. No, it is not. I refer to page 391, of P1.
>
> Ehh, P-2 sorry. This is the Joint Venture Agreement dated 16.12.1992 referred to as the JVA entered between DBKL and PRSB. The Plaintiffs and the Defendants were aware that under the JVA, DBKL could terminate the lease to PRSB over the Said Lands.
>
> The Plaintiffs and the Defendants were also aware that if the lease over the Said Lands were terminated, the charge over the lease given by PRSB to the Plaintiffs as security for the loan may be jeopardized. The Plaintiffs and the Defendants were also aware The Plaintiffs and the Defendants were also aware that if the lease over the Said Lands were terminated, the charge over the lease given by PRSB to the Plaintiffs as security for the loan may be jeopardized. The Plaintiffs and the Defendants were also aware
>
> The Plaintiffs did receive such a letter from DBKL dated 9.2.2010 requesting the Plaintiffs to nominate a substituted entity, on the basis that DBKL has issued notices of default to PRSB. A copy of the notice of default is seen at pages 1061–1066, P-3. A copy of the letter from DBKL dated 9.2.2010 to the 1st Plaintiff is seen at page 63, P-4.
>
> *The Plaintiffs did not agree to appoint a substituted entity to take over the debt of PRSB and Wembley. In fact, the Plaintiffs did not nominate any entity to revive the Project as the Plaintiffs were in no position to know who to appoint or how to do so.*
>
> *In view of the aforesaid. DBKL invited the Plaintiffs to meet with it and on 4.3.2010. the Plaintiffs (save for the 3rd Plaintiff) did attend at DBKL's premises to meet with DBKL's representatives.*

Q. Why did the Plaintiffs attend this meeting?

A. The said meeting was attended by the Plaintiffs only for the purpose of the Plaintiffs ascertaining what would happen to their security, i.e. PRSB's charge over the lease of 4 of the Said Lands, in view of DBKL's intention to terminate the Lease.

Q. *What transpired at the meeting?*

A. *At that meeting, the Plaintiffs informed DBKL they were unable to nominate a substituted entity for PRSB. DBKL had inouired if the Plaintiffs could allow DBKL to nominate a substituted entity instead of the Plaintiffs doing so. The Plaintiffs had no objection, in principle, as this would relieve the Plaintiffs of having to make such nomination, as was required under the JVA. It is noted the JVA is an agreement expressly executed by PRSB and PRSB would know full well of the terms therein for a nomination of a substituted entity.*

…

It was in the context of DBKL's request as described above that RHB Investment Bank issued its letter dated 29.3.2010 to DBKL This letter does not in any way relieve the Defendants from their debt due to the Plaintiffs. The obligations of PRSB as the Borrower and Wembley as the Guarantor, to repay their indebtedness to the Lenders remain unchanged. In any event, as far as the Plaintiffs are aware, there has been no new or substituted entity appointed by DBKL.

…

Q. Are you aware what has transpired in the negotiations between the Defendants and DBKL?

A. We were only aware that the DBKL, ehh, the Defendants have sued DBKL. I understand that the Defendants have obtained an injunction recently to restrain DBKL from terminating the lease over the Said Lands and from appointing any entity to take over the Project and that the dispute between DBKL and PRSB is to proceed to arbitration. Other than that, the Plaintiffs and I do not know much of what is happening between the Defendants and DBKL.

(The relevant answers are underlined for emphasis)

THE ISSUES

[32] On these facts, the issues to be decided are principally (1) whether the plaintiffs' claim is barred by limitation and (2) whether the plaintiffs' claim is defeated by waiver. The second issue concerns whether the plaintiffs have agreed to the appointment of the substituted entity under the JVA and as such can be said to have waived their strict rights under the loan and security agreements. As for the first issue on limitation, there are subsidiary issues to be considered and these can be enumerated as follows:

(a) whether time should run from the earliest date of default ie 3 April 1998;

(b) whether the relevant limitation period should be a period of six years on the basis that the claim is a claim based on a simple contract;

(c) alternatively, whether the relevant limitation period should be a period of 12 years on the basis that the claim is a claim based on the recovery of moneys secured by a charge;

(d) whether there were express acknowledgements of the indebtedness given by PRSB and Wembley on 24 March 2004, and therefore time for purposes of limitation should begin to run from this date;

(e) whether the DRA is a conditional or contingent contract which has become void for non-fulfilment of conditions precedent and therefore any acknowledgement of indebtedness within it is also to be regarded as void and of no effect; and

(f) whether the defendants should be estopped from raising the defence of limitation given their unconscionable conduct.

The summary positions of the parties

[33] To summarise the respective parties' positions at the outset, the plaintiffs have relied as their main argument the position that the indebtedness sought to be recovered constitutes moneys secured by a charge and therefore by s 21(1) of the Limitation Act 1953, the relevant limitation period is 12 years from the date when the right to receive the money accrued. Central to this argument is the decision of the Federal Court in *Tan Kong Ming v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601, where an action on the basis of a personal covenant to recover an indebtedness under a loan (on the facts a shortfall amount after foreclosure proceedings) was held subject to a 12 year limitation since it was money secured by a charge. The pertinent passage from the judgment is reproduced below:

> The primary issue in this appeal concerns the provisions of the Act. It is the appellant's contention that the respondent's claim for the balance after sale is a claim founded on contract and therefore subject to the limitation period of six years under s 6(1)(a) of the Act whilst the respondent contends that the claim is a claim for money secured by charge on land and therefore subject to the limitation period of 12 years under s 21(1) of the Act …
>
> Having had a close look at both sections mentioned above, we are of the view that s 6 cannot apply in this case in view of the express exclusion of 'any action to recover money secured by any mortgage of or charge on land' in s 6(5)(b). The action is therefore not founded on a claim on contract under s 6.
>
> In our judgment, the applicable provision is s 21. Section 21(1) specifically refers to an action to recover moneys secured by a charge which is an action in personam, whilst s 21(2) specifically refers to a foreclosure action in respect of mortgaged

personal property which is an action in rem. The limitation period is therefore 12 years from the date when the right to receive the money accrued or 12 years from the date on which the right to foreclose accrued respectively (per Alauddin FCJ at pp 607–608 of the judgment).

[34] However, there is an alternative argument which runs as follows. The plaintiffs submit since this present action is filed on 18 March 2010, even if the earliest possible date is taken as 3 April 1998, the claim cannot be said to be time-barred. Further and alternatively, there are clear and irrevocable acknowledgements of the debt due by both defendants by the letter dated 24 March 2004 and therefore even if the relevant limitation period is taken to be six years, this present claim will likewise not be time-barred by operation of s 26(2) of the Act. Further, the explicit provisions in the DRA regulate the rights and obligations of the parties. In this regard, the plaintiffs are not relying on the validity of the DRA per se; the letters of acknowledgement, although making reference to the DRA, are independent of the DRA. The plaintiffs deny there has been any waiver of their rights, or that they have elected to allow a third-party to assume the liabilities of the defendants by agreement with DBKL. The plaintiffs also rely on the conduct of the defendants and argue that it would be unjust and inequitable to permit the defendants to rely on the defence of limitation in the circumstances.

[35] The defendants argue that the relevant limitation period is six years, pursuant to s 6(1)(a), and since the plaintiffs' claim is based on a simple contract it is therefore time-barred since time should be calculated from the earliest possible date ie the demand made on 3 April 1998. Further, there is no express and irrevocable acknowledgement of the indebtedness since the acknowledgement given on 24 March 2004 is conditional upon the execution of the DRA which is itself a contingent contract which has become void for non-fulfilment of conditions precedent. Therefore, any acknowledgement of indebtedness contained in the DRA must itself be void in law. The plaintiffs have also elected and agreed to appoint a 'substituted entity' under the JVA and as such must be said to have waived their strict legal rights to claim against the defendants. The defendants have not denied that there was a drawdown of the facility and the sum of the RM50m by PRSB and further that the defendants have failed to repay the amount disbursed, but they are entitled to take the technical grounds they are advancing and cites the dictum by Edgar Joseph Jr J (as His Lordship then was) in *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62:

> This is yet another one of those cases where a borrower is attempting to avoid repayment of money he has borrowed on purely technical grounds. However, as I have said before, this is not a court of morals but a court of law and so if the borrower is right in its contentions, then it is entitled to succeed.

[36] I will now proceed to consider in more depth the detailed submissions. It will be convenient to elaborate on the defendants' arguments first.

THE DEFENDANTS' POSITION

[37] As previously stated, the defendants advance the argument that the effective date for purpose of calculating time is 3 April 1998. This, it is argued, is the declaration of default required by cll 15.1–15.2 of the loan agreement. Section 15.2 provides:

> Declaration of default: the agent may and if so requested by the Lenders shall, without prejudice to any other rights of the Lenders, at any time after the happening of an Event of Default by notice to the Borrower declare that —
>
> …
>
> (b) The Term Loan and all interest and concomitant commission and fees accrued and all other sums payable to the Lenders have become due and payable, whereupon the same shall, in accordance with the terms of such notice, become due and payable.

[38] It is submitted there is no other declaration of default. The letters of demand dated 25 February 2010 do not constitute such declaration of default.

DRA as an alleged contingent contract

[39] In reference to the acknowledgements made by the defendants on 24 March 2004, the defendants deny that the acknowledgments given were unqualified and unequivocal. The defendants argue the acknowledgments were given for the purpose of the DRA and conditional upon the DRA being executed and having effect. Reference is made in this regard to selected passages in the answers given by DW1 (Tang Yow Sai, a past director of the defendants from 1997–2005) which imply that this was so. These are the relevant parts quoted:

> DW1:
>
> (In Examination-in-Chief)
>
> A. The said letters were interdependent and conditional upon the Plaintiffs entering into the Debt Restructuring Scheme. We were prepared to sign the said debt acknowledgment letters dated 24.3.2004 as the said letters in particular paragraph 3 expressly provide for the Debt Restructuring Scheme to be entered into with the Plaintiffs. The said acknowledgment letters therefore were executed only on the condition of the Plaintiffs entering into a Debt Restructuring Scheme with the Defendants, (at page 125 of the Notes of Evidence)
>
> (In Re-Examination)
>
> A. The Bankers wanted an acknowledgement from us, from PR of the debt,

as there were delays in the signing the DRA. If I have not, if I recall correctly, the draft of the DRA was already in place during that time. But because the negotiation with Daewoo, the DRA could not be signed. And we wanted Daewoo to be in the DRA so that the Debt Restructuring Scheme will settle all the Creditors' and the Lenders' outstanding balances. But of course we are prepared to go without Daewoo-lah subsequently. So when the Bank approached us to give an acknowledgement letter to, I'm mean basically to, to ensure that the DRA, we will sign the DRA. So what we have done is that we have of course engaged with our solicitor to actually run through the wordings of the letter to ensure, number 1 is that when we acknowledge the debt as at 31/12/2001, it will tie back to the DRA execution and that the DRA will be executed but we don't know when, until Daewoo confirm their participation which I believe in October …

Q. Now, you mentioned the tied up of the DRA. Would you have executed these letters if it was not tied up to the execution of the DRA?

A. No.

Q. Okay Mr Tang look at the letter at page 601. Now you were cross-examined on this repeatedly; my learned friend in cross examination had asked you where does it say in the letter that it is a conditional upon the execution of the DRA? You attempted to reply. You replied that the letter does mention subject to conditions and terms contained in the DRA. Now, I think, look at the letter carefully, Mr Tang. My learned friend referred you to paragraph 4. Let me refer you to paragraph 4 'we hereby acknowledge and confirm that the amount of indebtedness owing by us to the Lenders under the Term Loan Facility, the Loan Agreement and the Security Agreement 76 million 028 021 as at 31/12/2001'. I mean those are the words in the letter. Yes?

A. Yes.

Q. Mr Tang, is this letter an unqualified acknowledgement of debt?

A. No.

Q. Why.

A. If it is unqualified acknowledgement letter of debt, paragraph 3 will not be there. And the last sentence will not be there. It will be a straight forward acknowledgement letter of debt. On this letter by its own, one should read paragraph 4 together with paragraph 3 they are continuous, they are not separated.

…

At paragraph 3, the Lenders have agreed to accept the debt restructuring proposed by Wembley and PR. All these are referring to the Debt Restructuring Scheme Agreement. So paragraph 4 is the continuing of the paragraph 3, we acknowledge the debt as at 31/12 is a 76 million and if subsequently what we have, should, will have said in a straight forward manner, we say if the debt, when the DRA is signed, interest from 2002 will have been waived.

A

Q. But that is not stated in here, Mr Tang. It says that 'we hereby acknowledge that we affirm the amount in paragraph 4 and it continues, that the interest shall coming to accrue and be payable thereon to the date of the full settlement unless waive in accordance to the terms in said DRA. It is set out here 'if and when it is executed by all parties'. Can you explain?

B

…

If and when will indicate that is the timing of the signing of the DRA. (at pages 188–190)

C

Section 33 of the Contracts Act 1950, voidness of the DRA and the plaintiffs' claim being time-barred

D

[40] The defendants essentially argue because the DRA was a contingent contract as referred to under ss 32, 33 and 36 of the Contracts Act 1950, the failure of the condition precedent made it void, and as such whatever express acknowledgment on the indebtedness due became void as well.

E

[41] These provisions in the Contracts Act read:

32 'Contingent Contract'

A 'contingent contract' is a contract to do or not to do something, if some event, collateral to the contract, does or does not happen.

F

…

33 Enforcement of contract contingent on an event happening.

(a) Contingent contracts to do or not to do anything if an uncertain event happens cannot be enforced by law unless and until that event happened.

G

(b) If the event becomes impossible, such contract become void.

…

36 When contracts become void which are contingent on happening of specified event within fixed time.

H

(1) Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible.

I

(2) Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and the event has not happened, or before the time fixed has expired, if it becomes certain that the event will not happen.

[42] Referring to cases such as *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47, *Jaafar bin Ibrahim v Gan Kim Kin* [1985] 2 MLJ 24, *Mintye Properties Sdn Bhd v Yayasan Melaka* [2006] 6 MLJ 420, *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 and *Verschures Creamaries Ltd v Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608, the position is taken that since there was no agreement between the parties because of the failure of the conditions precedent and the plaintiffs election to elect to treat the DRA as having lapsed and terminated, by extension there could be no acknowledgment of the debt after the DRA had been rendered void. In *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd*, for instance, it was said (in the context of a failure to obtain FIC approval):

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. *It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled.* (see *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 KB 297304 — per Denning LJ — and *Property and Bloodstock Ltd v Emerton Bush v Property and Bloodstock Ltd* [1967] 3 All ER 321 330 — per Sachs LJ. Until the FIC approval was given liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by s 33(a) of the Contracts Act which enacts:
>
> > 33 (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with s 33(b) of the Contracts Act, which is as follows:
>
> > 33(b) If the event becomes impossible, such contracts become void.
>
> We draw much support from *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47 which we think is on all fours with the case under the present appeal; the only difference being that in *Aberfoyle*'s case the parties expressly agreed that in the event of the non-fulfilment not only was the purchaser entitled to the refund of the deposit but that the agreement itself would become null and void. Whereas in the case under the present appeal the parties made no reference at all to the voidness or nullity of the agreement. This silence, in our view, is of no consequence because it is implicit that the validity or otherwise of the agreement depends entirely upon the general principle of the law of contract relating to the nature and effect of this sort of stipulation (per Salleh Abas CJ (Malaya) (as His Lordship then was) at p 219).

[43] Section 40 of the Contracts Act is further marshaled in support:

> 40 When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put on end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[44] On the facts, the plaintiffs have elected to put an end to the DRA. On this premise the plaintiffs cannot be allowed to approbate and reprobate. If the DRA is regarded by the plaintiffs as void, all its provisions should also be held void, including the acknowledgments of indebtedness and the rights to proceed against the defendants granted under the DRA. This argument is of course advanced in relation to the effect of cl 10 of the DRA, already alluded to earlier in this judgment. In this context, the cases of *Mintye Properties Sdn Bhd v Yayasan Melaka*, and *Verschures Creamaries Ltd v Hull and Netherlands Steamship Co Ltd*, are cited.

[45] To quote the relevant passage cited in the latter case of *Verschures Creamaries Ltd v Hull and Netherlands Steamship Co Ltd*:

> A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument … The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is a valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction (at p 612 of the report, per Scrutton LJ).

[46] Based on these arguments, the plaintiffs, it is argued, have to fall back on the demand made on 3 April 1998. This present action being filed on 18 March 2010, it is therefore time barred. The defendants take the position this present claim is a claim based on a simple contract claim under s 6(1)(a) and therefore the relevant limitation period is six years from 3 April 1998.

[47] Section 6(1)(a) reads:

> 6 Limitation of actions of contract and tort and certain other actions
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) actions founded on a contract or on tort …

[48] The defendants dispute the applicability of s 21(1) and the 12 year

limitation period since the plaintiffs' claim is not for the recovery of monies secured by a charge. Counsel for the defendants impressed upon this court that the plaintiffs' action is for the principal sum and interest under the loan agreement and is based entirely on the loan agreement. It is not an action to recover a shortfall after a charge action or one premised on a charge document. The Federal Court decision in *Tan Kong Ming v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601 is explained as limited to such latter actions. *Chan Boi Loi v Public Bank and another application* [2011] 1 MLJ 478, another Federal Court decision, is quoted to establish that *Tan Kong Ming*, is only properly concerned with recovery of shortfall in a suit after a charge action. Thus in *Chan Boi Loi*, the Federal Court stated:

> It is clear from the statement of facts in *Tan Kong Min v Malaysian National Insurance Sdn Bhd* that the only points in the case that called for decision were (i) when the insurance company's cause of action to recover the shortfall arose and (ii) which period of limitation was to be applied, that is, the six years prescribed by s 6 or the 12 years prescribed by s 21 of the Limitation Act 1953. The observation 'where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the annexure to the charge, the respondent is not entitled at law and in equity to proceed by way of a civil suit before first realising the security under the charge' is pure obiter dicta and not part of the ratio decidendi. It is not to be treated as binding authority. At the risk of repetition, *Tan Kong Min* was an action to recover a shortfall that had occurred after the sale of the security. It was not an action for the recovery of a debt due from the borrower to the lender (per Gopal Sri Ram FCJ, at pp 483–484).

[49] The old decision of the English Court of Appeal in *Barnes v Glenton* [1899] 1 QB 885, is cited by counsel for the defendants, for the principle held therein that the equivalent English provision applied to 'actions to recover money charged on land', which applied also 'to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land' (per AL Smith LJ at p 888 of the report). It cannot therefore apply to a simple contract action not premised on any charge on land or a personal remedy on a covenant in a charge. See also *Wilkinson v West Bromwich Building Society* [2004] EWCA Civ 1063:

> … where the mortgagee has sold the mortgage property, but the proceeds of sale are insufficient to cover the balance of the advance still owing, 12 years is the relevant limitation period applicable to a personal action by the mortgagee on an express covenant by the mortgagors in the mortgage deed to repay the advance on the mortgagors' failure to keep up agreed instalment payments. That is the result of reading ss 8 and 20(1) together and applying them to actions against the mortgagors to recover the balance of the principal sum.

[50] *Barnes v Glenton* dealt with the English Real Property Limitation Act 1874. *Wilkinson v West Bromwich Building Society* was concerned with the English Limitation Act 1980.

[51] These are the equivalent relevant provisions in the English Limitation Act 1980:

> 5 … An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.
>
> 20 (1) No action shall be brought to recover —
>
> (a) any principal sum of money secured by a mortgage or other charge on property (whether real or personal); or
>
> (b) proceeds of the sale of land;
>
> after the expiration of 12 years from the date on which the right to receive the money accrued …

[52] The defendants' stand on the alleged waiver of the plaintiffs' rights against them has been alluded to earlier.

[53] Something needs to be said in relation to the issue of whether demand was made against the second defendant as guarantor, and if so, when. It is common ground between the parties that as far as the second defendant is concerned, the payment of the indebtedness is dependent on demand being made. It is equally common ground that there was no demand made against the second defendant as guarantor on 3 April 1998. The demand made on this date was sent only to PRSB. It is the plaintiffs' pleaded case that letters of demand were sent to both PRSB and Wembley on 25 February 2010. This fact is not disputed by the defendants.

THE PLAINTIFFS' POSITION

[54] The plaintiffs have argued that the relevant limitation period on the facts of this case is not six years but 12 years, since this is a claim for monies 'secured by a charge' under s 21(1) of the Limitation Act:

> 21 Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds from the sale of land
>
> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

[55] As indicated earlier, strong reliance is placed on the Federal Court decision in *Tan Kong Ming v Malaysian National Insurance Sdn Bhd. Mahadevan & Anor v Manilal & Son (M) Sdn Bhd* [1984] 1 MLJ 266, another Federal Court position, is further advanced to support the submission that s 21(1) should be broadly read such that in cases where moneys are secured by a charge, the limitation period is still 12 years even where the claim is brought on the basis of a personal covenant in a loan agreement. In *Mahadevan v Manilal*, for instance, the foundation of the claim was not brought on the basis of any written charge instrument but on the basis of simple loan agreement where the lender provided funds to the borrower partly to purchase a piece of land and was suing to recover this loan. The Federal Court held that in such circumstances an equitable charge was created in respect of the loan to purchase the land and thus it was a case of the claim for the recovery of money secured by charge, albeit an equitable charge. To quote the relevant passage in the judgment:

> The next issue is whether this suit which was commenced on 30 July 1974, ie more than seven years after the money was received, is not barred by limitation period. This question, however, in turn depends upon the purpose for which these two sums were paid and upon the nature of rights acquired by the respondent regarding these payments.
>
> There are two provisions of the Limitation Act 1953 (Malaysia Act 254) which are relevant for this appeal. These are ss 6 and 21(1) …
>
> The next question is whether the transactions surrounding the payment of these two sums … resulted in an equitable charge in favour of the Respondent. If they did, s 21(1) applies and the suit is therefore not statute-barred; but if they did not, the suit is barred under s 6(1) because of the lapse of more than seven years after the payments.
>
> Whether or not these transactions created an equitable charge depend upon the intention and conduct of the parties at the time when the payments were made …

[56] *Chan Boi Loi v Public Bank and another application*, properly read, does not contradict with these decisions. Chan Boi Loi is concerned more with the issue whether it is necessary to exhaust a claim in a charge action first before proceeding with the claim based on a personal covenant in a loan agreement, to which the Federal Court answered in the negative.

[57] In the course of submission the recent written decision of Lee Swee Seng JC in *Malayan Banking Bhd v Wembley Industries Holdings Bhd* [2012] MLJU 91 was referred to, and it was impressed upon this court that the factual matrix in that case related to the very same DRA and Malayan Banking Bhd, the plaintiff in that case, was one of the financiers specified in Schedule 5 in the DRA. In reference to the applicable period of limitation, the learned judicial commissioner in that case opined:

> In my opinion, the reliance by the second defendant on s 6(1)(a) of the 1953 Act is misplaced. In our present case, the action of the plaintiff against the defendants is to recover the loan amount under the term loan and overdraft facility which is secured by a mortgage. In *Tan Kong Ming* … The Federal Court decided that in view of the express exclusion of 'any action to recover money secured by any mortgage of or charge on land' in s 6(5)(b), s 6 cannot apply in actions for money secured by any mortgage or charge on land. Their Lordships observed further that such an action is not founded on a claim on contract under s 6. The applicable provision, according to Their Lordships, is s 21 of the Limitation Act 1953 … In our present case, the action being an action to recover money secured by a mortgage, the applicable provision of s 21(1) and not s 6. The limitation period is therefore 12 years from the date when the right to receive the money accrued …(at pp 15–16 of the judgment).

[58] The defendant in that case is the very same second defendant in this present action, ie Wembley Industries Holdings Bhd, and the same argument on limitation was advanced in that the earlier case.

[59] As regards the applicability of s 33, and the categorisation of the DRA as a conditional contract, this has been strongly challenged by the plaintiffs. It is argued that the reliance on an alleged contingent contract, and s 36 in particular, is irrelevant, since the plaintiffs are not enforcing the DRA, but relying on an unequivocal admission of an existing debt.

[60] *Upendra Nath Mitra's Law of Limitation and Prescription* (6th Ed), is quoted for the proposition that although a document may be void, it may still be admitted for 'collateral purposes':

> Though for want of a satisfactory explanation, the document made it void for the purpose of creating an interest under it, it may nevertheless be admitted for collateral purposes. This principle has been adopted in *Atmaram v Umedram* where it was held that the rule of non-enforceability on the ground of material alteration does not affect its availability as an acknowledgement, as it is merely evidence of the defendant's pre-existing liability and not the foundation of the plaintiff's claim.

[61] *Pengurusan Danaharta Nasional Bhd & Ors v Tan Sri Dato' Tajuddin Ramli (No 4)* [2010] 6 CLJ 84 is quoted to reinforce the stand of the plaintiffs. On the facts of this case, an acknowledgment of liability by the defendant in a terminated settlement agreement between the parties was held admissible to prove the liability of the defendant.

[62] Aside from the express acknowledgement of the indebtedness in the DRA and in the two letters dated 24 March 2004, they are also seven further acknowledgements made by PRSB as regards its indebtedness in the directors report and audited financial statements of the company from year ended 31 December 2003 to year ended 31 December 2008. See pp 718–930, exh

P3.

EVALUATION AND DECISION

[63] I have given full consideration to the extended submissions by the parties, and the weighty arguments marshaled by both parties, as well as the testimonial and documentary evidence adduced at trial. I have taken note that the decisions by the higher courts, which hold 12 years to be the relevant limitation period, have been based on factual matrixes where the claims related to moneys under a charge. See the leading Federal Court decision in *Tan Kong Min v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601 and *Mahadevan & Anor v Manilal & Son (M) Sdn Bhd* [1984] 1 MLJ 266 in particular. In this regard, the decision of the English Court of Appeal in *Barnes v Glenton* [1899] 1 QB 885, cited to this court by counsel for the defendants, has also been taken into consideration for the principle held there that the equivalent English provision applied to 'actions to recover money charged on land' which applied also 'to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land' (per AL Smith LJ at p 888 of the report). A simple contract claim, it has been argued, should be decided on the basis of s 6(1)(a) as opposed to a claim where moneys are being claimed directly under the charge instrument. In a way, the court is being asked to determine the issue on the basis of the source of the claim, and not the nature of the facility generally.

[64] With respect, this court has to decide the matter on the basis of our own statutory formula. That this is the correct approach is highlighted by the Privy Council in *Kong Ming Bank Bhd v Sim Siok Eng* [1982] 2 MLJ 205. Reading our own statutory formula on the basis of acceptable principles of statutory interpretation, the wording is clear. It refers to an action 'to recover a principal sum of money secured by a charge', in addition to an action 'to enforce such charge', or 'to recover proceeds of the sale of the land'. Section 6(5) itself contains a savings provision which makes s 6(1) dependent on s 6(5)(b):

> 5 Nothing in this section shall apply to:
>
> (b) any action to recover money secured by any mortgage of or charge on land or personal property.

[65] This express provision is absent in the parallel English legislation, which has been quoted above.

[66] Thus, properly read, our s 21(1) provides a limitation period of 12 years for a claim of money which is secured by a charge. It is not the source of the claim that is critical, but the more general consideration whether the money being claimed is secured by a charge. The logic is not difficult to see. It is to

avoid an incongruous situation where two different limitation periods are applicable to the same facility where the facility is secured by a charge.

[67] In arriving at this conclusion, I am therefore of the same view as expressed by Lee Swee Seng JC recently expressed in *Malayan Banking Bhd v Wembley Industries Holdings Bhd* [2012] MLJU 91. The relevant passage of the learned judicial commissioner has already been alluded to.

[68] I have carefully considered the three Federal Court decisions in *Tan Kong Ming, Mahadevan v Manilal and Chan Boi Loi*, and am of the view that these decisions have approached the issue of the applicable limitation period quite broadly. In *Mahadevan v Manilal*, in particular, the action was not grounded on any written charge annexure containing terms of the loan but was grounded principally on the personal covenant of the borrower. *Chan Boi Loi*, in my considered view, does not support the proposition that where an action is grounded on a personal covenant in a loan agreement, as opposed to a charge instrument, the shorter limitation period of six years should apply, even though the money sought to be recovered is secured by a charge.

[69] Further, even if I am wrong on this reading of s 21(1) read in conjunction with s 6(5), the facts indicate clearly there was an express acknowledgment of the debt under s 26(2) and s 27(1) of the Act. To quote the pertinent parts of these provisions:

> s 26(2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim … and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of acknowledgment or last payment.
>
> s 27(1) Every such acknowledgment as is referred to in section 26 … shall be in writing and signed by the person making the acknowledgment.

[70] Recitals B and C, Schedule 3 and cl 10 of the DRA make this plain. This is in addition to the letter of 23 March 2004 referred to earlier. Clause 10, for instance, is particularly explicit:

> 10.1 The Company and PRSB hereby acknowledge and admit that the amount of indebtedness owing by each of them to the Financiers and Creditors under or in respect of the Facilities and the Non-Financing Documents respectively as at the 31st day of December are as set out in the fifth column of Schedule 3 herein.

[71] All that the law requires is for the acknowledgement to be unequivocal and in writing. Both requirements have been satisfied. In these circumstances, the operative date for calculating limitation will be 23 March 2004, if s 6(1)(b)

applies, which respectfully in my view, it does not. The present action is filed on 18 March 2010; it will on the alternative view be within the limitation period. A

[72] As for the argument advanced by the defendants that the termination of the DRA puts to naught all the provisions in the DRA, this is a matter of contractual intention and general law. Clauses 2.5–2.6 of the DRA are again explicit and clear. In the event of termination for failure to comply with any of the conditions precedent under cl 2.1, 'then all the Financiers and Creditors shall be immediately discharged from all their obligations to the Defendants, whereupon each of the Financiers and Creditors shall be entitled to make demand for the immediate payment or repayment of all outstanding indebtedness together with interest thereon 'as if this Agreement had never been entered into'. B C

[73] This being the contractual intention, it will be unconscionable for the defendants to now argue that they are no longer bound to pay on the basis of what amounts to a very strained reading of the interlocking clauses. D

[74] The submission of plaintiffs' counsel that the plaintiffs are not relying on the performance of the DRA per se therefore has merit, and I agree with the position taken. As stated by the learned commentator of *Mitra's Law of Limitation and Prescription*, the rule of non-enforceability of a contract does not affect its availability as an acknowledgement, as it is merely evidence of a defendant's pre-existing liability and not the foundation of the plaintiffs claim. E F

[75] It seems clear from the testimonial evidence of DW1, when pressed in cross-examination, that the letters of express acknowledgement of the indebtedness dated 23 March 2004 was unequivocal and not conditional upon the DRA being executed. In March 2004 there was no certainty when the DRA would be executed, in view of the uncertain stand of Daewoo. I reproduce below the relevant parts of the testimony during cross-examination from pp 160–169 of the notes of evidence: G H

> Q: The negotiations with Daewoo, right. So as at March 2004, I keep coming back to this, there was no certainty when the DRA was going to be signed, am I correct? No certainty.
>
> A: Okay, as at March 2004, why I say … I mean as at March 2004 we would not know … we did not know Daewoo will pull out from the negotiation. I
>
> Q: Right.
>
> A: From the scheme.
>
> Q: Right.

A: Until I think sometime in October September then officially said they will not be participating. That's where I think the DRA was signed without Daewoo.

Q: *Right. Okay. This is very simple question I ask you. In March 2004. there was no certainty when the DRA will sign. Very simple question.*

A: *Yes.*

Q: Yes? What was Daewoo's debt, if I may ask? What was Daewoo's debt in the region of …

A: Ermm … probably above 100 million.

Q: Above 100 million?

A: Ya.

Q: That … that would put a spanner in a work, isn't it? That would substantially affect your … your Restructuring Scheme isn't it? The fact that one major creditor owed a 100 million does not participate. Do you agree that it will affect the Restructuring Scheme?

A: It will affect a bit.

Q: *I put it to you. Mr Tang, that it was due to numerous changes in 1999 all the way to 2004, numerous changes to PR's Debt Restructuring Scheme that the Plaintiffs were worried that too much time would pass, and that is why they had asked for letter 24/3/98 ermm … Q4. Do you agree with me?*

A: *No.*

Q: *There's too much time has passed.*

A: *I don't know.*

Q: *You don't know?*

A: *I don't know.*

…

Q: You have said, you were involved in the preparation or rather in the setting up of this DRA. And at page 523, you have confirmed that these are various Creditors and Financiers to sign the DRA. Can I refer you to page 526 which is the schedule of all the debts due to each of the Lenders or Creditors. Now, this set B amounts, and I understand you fixed it to make sure you lock in all the Creditors' debts as at this date right? If now, do you agree that if you have not furnished these letters to the Lenders, Lenders would not have signed the DRA.

A: They would have signed the DRA but they will not move the cut off date to a later date.

Q: Mr Tang, you seemed to be fixated on the quantum. You seemed fixated on the cut off date being the amount due as at 2001.

A: Yes because

Q: I know you are thinking about that. But I'm thinking something else and

I just want to ask you this. If you had not furnished these letters signed by you and as prepared or drafted by lawyers to the bankers, do you know whether the bankers will signed the DRA? I mean all honesty here. You are under oath.

A: They may have pull out-lah.

Q: They may have pull out?

A: Em …

Q: Just a question Mr Tang, who are the lawyers acting for PR in this matter?

A: Chor Pee Anwarul.

Q: Okay, now let's look at, just have a quick glance at the DRA, Mr Tang at page 491 of P2. Now Mr Tang, you were personally involved I think, yes you I may refer you to page 492 which is the front page of the DRA at preamble C you have confirmed that the amounts due and owing to each of the creditors as at 31/12/01 is shown in Schedule 3 at 526 we looked at.

DW1Ya.

Q: Looking at 526 you confirmed that Plaintiffs debts is listed under secured Financiers.

A: Correct.

Q: And as at 31/12/01, the amount stated to be owed is a total of 76 million plus.

A: Correct.

Q: *Right? Now, do you know whether any statement in this agreement that you are aware of, that savs that if DRA lapses these figures, these acknowledgements will no longer apply? Is there any statement in the DRA that you are aware of?*

A: *Uh … let me see.*

Q: *You are not certain?*

A: *I'm not certain.*

(Emphasis added.)

[76] From the point of view of the testimony therefore, the evidence given for the defendants to persuade the court that the acknowledgements were conditional and equivocal is wholly unconvincing.

[77] Further, as far as the second defendant is concerned, it will not matter whether there was or was not an acknowledgment in March 2004. On the evidence there was no letter of demand sent to Wembley on 3 April 1998. The only letter of demand sent to Wembley as guarantor was on 25 February 2010. No issue on limitation therefore arises in relation to Wembley, since the period of limitation runs from the accrual of the cause of action which arises only

upon demand being made in 2010. The relevant principles have been comprehensively laid down in the cases, and suffice to mention this court's own decision in *Public Bank Bhd v Tan Sri Datuk Yacob Hitam & Paramjit Singh Gill* [2011] 6 AMR 364.

[78] Two other matters require mention. First, the argument by the defendants that even if the claim is not regarded by this court as barred by limitation, the claim for interest must fall to be considered under s 21(5) of the Limitation Act (Section 21(5): No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land … shall be brought after the expiration of six years from the date on which the interest became due …). On this, I agree with the plaintiffs' position that aside from not being pleaded, cl 16.1 of the loan agreement allows the capitalisation of interest such that what is being claimed as interest becomes part of the principal sum. The right to claim such interest is contractual and the defendants should be held bound to what has been expressly agreed. See eg *CIMB Bank v Tan Hua Peng @ Tan Kwah Peng* [2012] 8 MLJ 442 and the Federal Court decision in *Terengganu State Economic Development Corporation v Nadefinco* [1982] 1 MLJ 365.

[79] The second matter relates to the alleged 'waiver' by the plaintiffs of their rights under the loan agreement. This argument is grounded on s 9.03.1 of the JVA between the first defendant and DBKL. The plaintiffs are not parties to the JVA. The JVA provides that in the event of default by the first defendant of the JVA, the financiers can nominate a substituted entity in place of the first defendant within 60 days after being served with such notice of nomination. Although there is evidence to show the financiers were willing to allow DBKL to nominate such substituted entity and there was a meeting held with DBKL, the evidence falls far short of a waiver. In any event no substituted entity was appointed by DBKL and there is an arbitration proceeding presently between the first defendant and DBKL. It is also in evidence that PRSB has factored in the claim by the plaintiffs against it as part of its own claim against DBKL. This added evidence points to another weakness in the defendants' case and the absence of real merits in the defence.

[80] I am therefore allowing the plaintiffs' claim as pleaded in the amended statement of claim, para 25(a)(i)–(ii), (b), (c), (d), (e) and (f) (with costs and expenses (excluding legal expenses) incurred by the first plaintiff to be assessed

before the deputy registrar), and costs to be paid by the defendants on a solicitor-client basis to be taxed before the deputy registrar. Judgment shall be entered accordingly.

Claim allowed with costs on a solicitor-client basis to be taxed.

Reported by Ashok Kumar